United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-1107 B pls

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS GUERRA,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

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PRELIMINARY STATEMENT

The Indictment and Preliminary Proceedings

Louis Guerra was originally charged by indictment filed on June 18, 1974, [1] with conspiring to distribute and possess with intent to distribute Schedule I and Schedule II narcotic drug controlled substances and with a substantive count of distributing and possessing with intent to distribute cocaine in violation of 21 U.S.C. §812, 841(a)(1) and 841(b)(1)(A).

The indictment was in nine counts. The first count alleging conspiracy charged defendant Guerra as well as 29 others with a narcotics conspiracy from January 1st, 1973 to the date of filing the indictment. In addition, the government provided defense counsel with two separate lists containing the names of 31 individuals whom it claimed were co-conspirators.

Fourteen Overt Acts were alleged to be in furtherance of the conspiracy. The only controlled substance named in the Overt Acts was cocaine. Defendant Guerra was named in Overt Acts 9 and 13. [2]

Counts 2-9 alleged substantive violations of United States drug laws. Guerra was charged alone in Count 4 with distributing and possessing with intent to distribute cocaine in early November in violation of 21 U.S.C. §§812, 841(a)(1), and 841 (b)(1)(A).

On the date of the trial, the government filed a superceding indictment 75 CR 5 (A43). As concerned defendant Guerra, the second indictment differed in that Guerra was named in only one Overt Act (No. 9—original Overt Act No. 13 was dropped) and Count Four was alleged to have occurred in October, 1973 as opposed to November, 1973 as alleged in the June 1974 indictment. As to the identity of the controlled substances allegedly possessed and distributed, the indictment, in the Overt Acts and substantive counts, named only cocaine, as had the superceded indictment.

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1. 74 CR 620. (A32)

2. Bill of Particulars in response to defense counsel's requests stated that Overt Act #13 was to be disregarded.

Defense counsel made a motion for inspection of the grand jury minutes, for severance, and for continuances once having learned of a new indictment on the day of trial. All motions were summarily denied.

Seventeen defendants [3] proceeded to trial in the United States District Court for the Southern District of New York before the Honorable Robert L. Carter and a jury. On January 30th, 1975, after a trial lasting some 3-1/2 weeks, and a transcript of 3,500 pages, the jury returned an acquittal for defendant Guerra on the substantive count (Count 4) and a verdict of guilty on the conspiracy charge.

The jury acquitted eight defendants. [4] All defendants who were charged with substantive crimes of cocaine distribution were acquitted of those charges. [5] Seven defendants, including Guerra, were convicted on the conspiracy charge. [6]

On March 20, 1975, Judge Carter sentenced Guerra to a term of five years imprisonment, a $5,000 fine and 3 years special parole.

Notice of Appeal was filed and subsequently it was ordered that appellant's brief and appendix be filed by June 9, 1975.

QUESTIONS PRESENTED

1. Whether prosecutorial tactics and strategems in prosecuting multiple transactions as a single conspiracy and attempting to suppress "3500" material and *Brady* material deprived the appellant of a fair trial?

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3. The defendants Ernest Coraluzzo, Albert Rossi Jr., Robert Browning, Gerald Rubin, Charles Quida, Mario Marrero, pleaded guilty before trial. The defendant Peter Cosme was severed. The remainder of the defendants were never apprehended.

4. Webster Bivens, Steven Crea, Joseph Lepore, Philip Cimino, Thomas Vasta, Susana Sherman, Anita Coraluzzo, and Nathaniel Arnold. The jury could not agree as to defendants Marilyn Greco and Cathy Spangler.

5. The defendants Crea, Joseph Lepore, Cimino, Arnold and Appellant Louis Guerra.

6. The appellants Joseph DeLuca, James Angley, James Capatorto, Raymond Thompson, Joseph Camperlingo and Angelo Bertolotti.

2. Whether the evidence at trial demonstrated multiple conspiracies?

3. Whether under the circumstances of this case it was proper for wiretapped phone conversations to be admitted into evidence?

(a) Whether the trial court committed reversible error by admitting the conversations into evidence as conversations in furtherance of the conspiracy?

(b) Whether it was prosecutorial misconduct for the government to present the wiretap conversations for the truth of the statements therein when he knew or should have known they were part of a fraud to obtain money?

4. Whether under the circumstances of this case it was reversible error to admit into evidence as acts in furtherance of the conspiracy independent transactions, and marijuana transactions?

5. Whether the trial court committed reversible error in its charge to the jury?

STATEMENT OF FACTS

Government Theory of the Conspiracy

Questions of the scope and objectives of the conspiracy were raised by defense counsel from the inception of the case. Discovery of Overt Acts other than those listed in the indictment to be used at trial was requested from the government by motions.

As of the date of the trial, January 6th, 1975, defendant Guerra knew only the dates, places and participants of the Overt Acts listed in the indictment and Counts 2-9. The controlled substance named in the indictment was cocaine.

In the Government's opening statement to the jury, the conspiracy was explained to be larger than just cocaine. [7]

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7. That defense counsel remained under the belief that the conspiracy was a cocaine conspiracy is evident from objections to testimony on other drugs elicited by government early in the trial. i.e. There was an objection to testimony on the robbery of manita on the grounds that manita was part of heroin dealing and had nothing to do with cocaine. The government responded that "The conspiracy involves both heroin and cocaine and marijuana." (183) Similarly, objection to testimony on marijuana dealings was overruled on the grounds that it was an objective of the conspiracy. (186).

> This is a narcotics case. It involves dealings in narcotics by some 29 defendants during 1973. The transactions include cocaine, marijuana and heroin. (43-44)[8]

The conspiracy centered around the partnership of Ernie Coraluzzo and Albert Rossi who associates with defendant Guerra and others. (49)

On the basis of the government's contention that the conspiracy involved heroin and marijuana as well as cocaine, testimony concerning such transactions were repeatedly admitted into evidence over the objections of defense counsel.

Discussions of the parameteurs of the alleged conspiracy were most extensive at the point in which the government wished to have Gary Pearson [9] testify about six drug transactions with Louis Guerra. Defendant Guerra moved for a definition of the conspiracy alleged in Count I of the indictment and for preclusion of testimony relating to narcotic deals between Pearson and Guerra not related to the Florida Flynn deal. (944-955, 956)

After first attempting to define the conspiracy as "any narcotics transactions with people involved here" from January lst, 1973 to June 18, 1974, the government was forced to further delineate the scope of the conspiracy. (946-7) [10]

The government then proceeded to put forth two other theories of the conspiracy. Immediately following the any-deal-in 1973 theory, the government stated:

> This is a single conspiracy involving Mr. Rossi buying and selling narcotics from the individuals at trial. (948)

This statement was immediately amended so that the deals involved both "Mr. Rossi and Mr. Coralluzzo." (949)

Guerra was placed by the prosecutor as a supplier of narcotics to various of these members—and at the same time

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8. Unless otherwise indicated all references are to the trial record.

9. Gary Pearson is an unindicted co-conspirator.

10. The court held that "the defendants are entitled at this point for the government to give them the theory of the case." (951) and that defendant Guerra was entitled to have Pearson's testimony excluded if its content was outside of the conspiracy being tried. (951).

buying narcotics from them. "Mr. Guerra is at the top right now." (951)

The court rejected Guerra's motion to exclude Pearson's testimony and to require the Government to state whether Pearson was dealing with Guerra as a middleman between Pearson and Rossi and Coraluzzo. (953-54) Over defense objections of prejudicial effect, the court ruled that objections should be made to evidence as it came in. (953)

The court did issue a warning to the prosecution, that while the court would accept and follow the government's definition of the conspiracy, that definition was "going to be the conspiracy tried." (955)

The next morning the court summarized the government's position by defining the conspiracy as involving Rossi and Coraluzzo dealing in cocaine with other individuals. (962) The court then held that it would not allow testimony of narcotics dealings independent of Coraluzzo-Rossi ventures as proof of the conspiracy. (963-64)

At this point, the government put forward another theory of the conspiracy:

> Mr. Lavin: Secondly, it is the government's position that Mr. Coraluzzo, Mr. Rossi, Mr. Pearson, Mr. DeLuca, Mr. Lepore, all the defendants, including the witnesses and the defendants mentioned, formed a core group of people who dealt in narcotics, and early in 1973 Mr. Guerra acted as the supplier of narcotics to that group and he bought narcotics from Pearson. Mr. Flynn also supplied narcotics, unintentionally, it seems, at one point to that group.
>
> The Court: Who comprises the group, the core group?
>
> Mr. Lavin: Mr. Rossi, Mr. Pearson, Mr. DeLuca, Mr. Browning, Charles Guida, and Mr. Angley.
>
> The Court: Mr. Coraluzzo?
>
> Mr. Lavin: Mr. Coraluzzo. The government's argument

is that Mrs. Greco acted as a stash, let her place be used as a stash.

The Court: I am not asking you to define it all. All I am trying to find out is what you are describing as the conspiracy. You are now describing as the conspiracy that there was a group, Rossi, Coraluzzo, Pearson, Flynn, Browning, Angley and DeLuca, that this was the core group, and that these people, the defendants dealt with them in various kinds of narcotics transactions, either buying it or selling it or hiding it or something like that. Is that what you are talking about?

Mr. Lavin: Yes, sir, and Mr. Guerra supplied cocaine, the testimony from Mr. Rossi and the testimony from Mr. Pearson, supplied cocaine to the group. Mr. Flynn also supplied cocaine. When they got this cocaine, this core group, through Mr. Angley, through Mr. Guida, through Mr. DeLuca, through Mr. Lepore, sold it, and they sold it to these other individuals on trial.

Mr. W. Richman: Pardon me. I don't mean to interrupt. Can he refer to Louis Lepore, Your Honor, for the record?

Mr. Lavin: Joseph and Louis.

The Court: All right.

Mr. Lavin: They sold the narcotics to Mr. Camperlingo, Mr. Thompson, Mr. Bertolotti, there were negotiations with Mr. Vasta, there were sales to Mr. Arnold, there were sales by this core group through the other people who acted on their behalf to Mr. Serrano, there were attempts to sell to Mr. Lucas, to Mr. Crea, to Mr. Guerra, who at one point was the supplier and then after Florida became a purchaser of narcotics from these same people, to Mr. Rubin, to Mr. Cosme.

The Court: All right.

Mr. Lavin: That essentially is the conspiracy charged in the indictment, and the government submits that the indictment is really a very short period of time, January '73 to June of '74, and most of the testimony will end about May of 1974, and these people bought narcotics from each other and sold narcotics to each other, and they all were aware, which is very unusual in a conspiracy of this size, that practically everybody in this case knew of the existence of the conspiracy, knew the other people involved in the conspiracy, and knew the purposes and scope and aims of the conspiracy. (964-966a)

The "core group" was further defined by Mr. Lavin:

Mr. Coraluzzo and Mr. Rossi acted as the bosses of this core group. The people acted on their behalf, but essentially what was the core group, who worked for them and got paid for them, were dealing in narcotics with other people. (967)

On the basis of these definitions and after continued discussion between defense counsel, prosecution and court,[11] the Pearson testimony was introduced.[12]

During the pre-charge conference at the conclusion of the trial, the government's theory of the case changed as to the objective of the conspiracy.

Because of the problems of differences in penalties for marijuana violations as opposed to narcotics convictions, the government acknowledged that it had a problem in viewing marijuana transactions as being subsumed under the indictment. (2226)

The government then offered that proof of marijuana

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11. The colloquy which is cited, evolving in more detail the government's theory of Guerra's role in the conspiracy and its rationale for admitting testimony, is discussed *infra*, pp. 47-50.

12. See Statement of Case, *infra*, pp. 26-7 for summary.

transactions went to "proof of conspiracy" but were not acts in furtherance of the conspiracy (2228) despite the fact that marijuana deals were admitted as acts of the conspiracy. (2229)

Defense counsel made motions for mistrial based on the fact that no limiting instructions were given to the jury on the probative value of the marijuana transaction, (2230) which were denied by the court. (2231)

The government's summary was actually devoid of a succinct statement of the theory of the case for the jury. In most part, the prosecution summarized the evidence against each defendant.

As per defendant Guerra, the government's position consistently was that Guerra "was so deeply involved that he was one of the major suppliers to this conspiracy, at least until they went down to Florida . . ." (2629)

Rossi Meets Louis Guerra

Rossi and Ernest Coraluzzo went to meet Louis Guerra at his apartment on Barnes Avenue and Morris Park Avenue in the Bronx in late January or early February 1973. Present in the house at that time were Rossi, Coraluzzo, Guerra, and his wife and young baby. The purpose of the meeting, so Rossi testified, was to see if they could purchase marijuana or cocaine for personal use from Guerra. Guerra informed them that he was waiting for a shipment of cocaine and when it came in, they would be able to purchase some. (164-5) Rossi did not testify to any purchases of cocaine from Guerra until March of 1973.

The Samuels Robbery

In March of 1973, Rossi and Coraluzzo "ripped off" Greg Samuels[13] a man whom Rossi met on a trip to Ft. Lauderdale, Florida. Samuels initially informed Rossi that he had an individual who was interested in purchasing two kilos of cocaine. As a result of this conversation, Rossi called Louis Guerra on the

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13. Samuels is an unindicted co-conspirator.

telephone in New York City (168) and asked Guerra if he was able to provide "two Italian knits or apartments" to James Lump Lump Lombardo who will be arriving at Kennedy Airport on a certain flight. (168) Lombardo traveled to New York City and back to Florida on the same day with the two kilos of cocaine. (169) There is, however, no sale of cocaine. Rather, Rossi and Coraluzzo return to New York City with $36,000 in cash and return the cocaine to Guerra some two days later. (169) Rossi testified that Guerra said that he would have no difficulty in getting rid of the cocaine, but complained that the coke was a little short. (170) On cross-examination, Rossi testified that he told Agent Lough in the government's exhibit 3514 (A310) that Rossi brought the cocaine to Florida for the Samuels transaction.

> Q. Did you tell Mr. Lough this past April that it was you that brought the two kilos of cocaine to Florida?
>
> A: Yes, I did, if that's what the statement says. (709)

The Matthews "Transaction"

Rossi was introduced by Capotorto to Williard Williams a/k/a "Trees" who subsequently introduced him to Harry Harrison and through these three individuals, Rossi meets Frank Matthews (349).[14] After meetings in March, April, and May of 1973, first with Coralluzzo, and Harrison, and then with Frank Matthews (354), it was agreed that Rossi would sell 30-50 kilos of heroin to Matthews and Harrison (348). Prior to the receipt of over $350,000 delivered to Rossi's mother's home in the Bronx, Rossi stated that he had already arranged for the purchase of heroin (348). Rossi's sources for the 50 kilos of heroin were the elusive "Dom Boy" and "Louie" for whom Rossi could remember neither last name, address, nor telephone number. (671-672)

Rossi did not deliver heroin to Matthews and Harrison, but took the money and fled to the Bahamas until Coraluzzo followed him there, informing him that Capatorto was being held hostage until the money was returned. (350) Subsequently,

14. Harrison, Matthews and Williams are unindicted co-conspirators.

the money was returned through Capotorto to Matthews and Harrison. (350)

The Florida Cocaine-Marijuana Deal

In late May or early June, 1973, Rossi was contacted by Capotorto [15] and Thompson, who had said they wanted to come to New York in order to purchase a kilogram of cocaine to bring back down to Florida. Rossi and Coraluzzo met with Capotorto and Thompson at Salvatore Ripulone's house. (170) Rossi testified that Capotorto said that four people (Capotorto, Thompson, Bertolotti, and Camperlingo) had pooled their money in order to buy the kilo of coke and finance the trip. (171-2)

Rossi called Guerra and asked him if he could provide a kilo of coke to sell to Capotorto and Thompson. Rossi testified that Guerra said he wasn't able to get it immediately. (173) The next day, Guerra came to Rossi's mother's house to deliver two kilos, which he carried in an attache case. Guerra told Rossi that one kilo was pure, and the other was hit, and that he suggested Rossi try to push the hit kilo. (174) Rossi testified that since he did not want Thompson and Capotorto to see Guerra, he had them leave his mother's house and sit in Capotorto's car while Guerra came in. Rossi testified that Thompson, Capotorto, and Ripulone snorted the coke received from Guerra, and agreed to take not only the first kilo, but the second kilo on consignment. Thompson gave Rossi between $17,000 and $19,000 for the kilo and then Thompson and Capotorto got in their car and drove to Florida. (174-5) Coraluzzo and Rossi each kept between $2500 and $3000 and personally gave Guerra the remainder of the money the same day at his home. (175) Rossi testified that in Guerra's living room was an auto tire, which Guerra explained was used to get coke from California to New York.[16] (176)

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15. Defendant Capotorto maintained that during this period of time he was being treated for hepatitis in a Florida hospital. (1961-62)

16. This reference of coke from California and one made in wiretapped conversations were the only "evidence" presented of Guerra's supply of narcotics with the exception of the marijuana and cocaine allegedly bought from Rossi himself.

Rossi, in June of 1973, made attempts to collect money from Capotorto and Thompson in Florida for the kilo given to them on consignment. Rossi met with Thompson, Capotorto and Coralluzzo in the cocktail lounge of the Jolly Roger Hotel in Ft. Lauderdale. (178) Rossi testified that Thompson complained to him that the coke wasn't shooting coke, and that they were having problems in getting it sold. Rossi said that that was no concern of his and that he wanted the money. (178) At that time, Rossi and Coralluzzo received $5,000 from Thompson, which they split. (178-9)

Rossi also testified that he had a meeting in Florida at approximately the same time, the end of June or July, at Camperlingo's home, with Bertolotti, Camperlingo, Thompson, and Capotorto, during which preparations for receipt of a shipment of marijuana was discussed.[17] (321-2) Rossi testified that at that meeting problems with the coke were also raised and that Thompson, Camperlingo and Bertolotti made arrangements with Rossi and Coraluzzo to give them 500 to 600 pounds of marijuana as payment for the cocaine. (325)

In August of 1973, Rossi testified that he had another meeting in Florida in Camperlingo's home, at which, in addition to Camperlingo, Bertolotti, Thompson, Capotorto and Coraluzzo, Nicholas DeGeorgia and Louis Lepore[18] were present. (327) At this meeting, the difficulties in getting marijuana off the boat, as well as the continual problems in getting rid of the cocaine, were discussed. (328)

Subsequently, however, Rossi testifies that the marijuana was docked, and with intricate details, describes the transportation of the marijuana to the New York City area.[19] (328-333) DeGeorgio rented a camper to carry the marijuana and drove with Rossi to New Jersey. (328-329) Capotorto and Louis Lepore drove in Capotorto's car. They drove to West Milford,

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17. Defense objections to testimony concerning marijuana were overruled. (322)

18. DeGeorgio and Louis Lepore are both unindicted co-conspirators.

19. A motion to strike all of Rossi's testimony concerning that marijuana transaction as being unrelated to the indictment was denied. (336)

New Jersey, to a house that Louis Guerra rented. They were supposed to meet Guerra, and after some mix-up in directions, finally met with Guerra at the Holiday Hotel in the Bronx. After the meeting, Guerra and Browning drove the camper to West Milford, New Jersey, with Rossi and Capotorto following them in the car. They unloaded approximately 600 pounds at the West Milford house and distributed the marijuana, giving 100 pounds to Guerra. (330-1) Coraluzzo took 200 pounds; 125 pounds went to Louis Lepore. Guida took 50 pounds which he said he would deliver to Bivens. (331)

Rossi testified that in September of 1973, Camperlingo appeared in New York City, and called Rossi at the West Milford house and said that he wanted to meet with Rossi. Rossi made arrangements for a meeting to be held at Guida's apartment. (337) Subsequently, Camperlingo met with Rossi, Capotorto and Guida. Camperlingo said that money was owed on the marijuana and that he was being "beat." (338)

Arrangements were made for another meeting at the Cafe Ferrara during the Feast of San Gennaro. (339) At that meeting, Rossi, Camperlingo, Coraluzzo, DiSalvo and Guerra were present. There they discussed problems with the marijuana and the price to be paid for the marijuana received. (339)

Rossi agreed to give Camperlingo 125 pounds of marijuana as compensation (338) and Coralluzzo agreed to give Camperlingo $2,000 or $3,000. (339)

Lucas-Mengrone "Transaction"

1. The Undisputed Facts

Albert Rossi met in August 1973 with Frank Lucas [20] at Mt. Vernon, New York, for the purpose of negotiating a sale of 10 kilos of heroin. (340) Present at the meeting were Rossi, Lucas, Peter Mengrone and Morris. [21] (340) Rossi promised that if the money were available (some $250,000) he would

20. Lucas is unindicted co-conspirator.

21. Peter Mengrone is unindicted co-conspirator. Morris is unknown.

"ascertain the heroin." (340) A week later a down payment of $29,000-$30,000 was delivered to Rossi by Lucas and Mengrone at 233rd Street and Baychester Avenue in the Bronx. (341)

After receiving the money, Rossi and Robert Browning prepare a pancake mix as a substitute for the heroin.[22] (693-695) Louis Lepore was instructed by Rossi to call Mengrone to tell him the "money was funny" and that it had to be checked out before delivery of the heroin could be made.[23] (692) The purpose of these calls was to stall Mengrone because there was no intent to deliver. (692)

Heroin was never delivered to Lucas or Mengrone and money never returned. In fact, the transaction was a "rip-off." (342, 678, 799) The $29,000-$30,000 was kept by Rossi with payments of $1,000 to Browning, $3,000-$4,000 to Capotorto, $3,000-$4,000 to Jimmy Esposito. (342) Some $8,000 of that money was used to pay for expenses for the trip to Florida.[24] (342)

Prior to Rossi's receipt of money from Lucas-Mengrone, some $5,000 had been ripped off from Mengrone by Ernest Coraluzzo. (683)

2. Defendant Guerra's Participation in the Transaction as Testified to by Government Witnesses

Rossi testified that he discussed the deal with Guerra prior to his receipt of the money from Lucas-Mengrone,[25] (345) and that Guerra was happy about being able to make a lot of money. (697) Guerra was told by Rossi that it was a rip-off a day or so after Rossi got the money, (344) as well as being told by Mengrone, Browning and Coralluzzo. (344) That Guerra knew it

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22. Rossi testified that he could have gotten the heroin from "Dom Boy" if he had the money. (677)

23. Initially, Rossi "did not remember" asking Louis Lepore to make the phone calls to Mengrone. (692)

24. Though Rossi does not say so directly, it can be assumed that "the Florida trip" was the Flynn rip-off.

25. Coraluzzo, Louis Lepore, Capotorto, and Browning, Morris and Pinky also had knowledge of the deal. (343)

was a rip-off was corroborated by Gary Pearson, who testified that Guerra told him that he was in the middle of a rip-off and was being held responsible for the rip. (1016)

Guerra's role in the rip-off was never clarified by the testimony. The prosecutor did not ask Rossi any questions about Guerra's activities, and on cross-examination, Rossi's answers were ambiguous.

> Q: Didn't you call Mr. Guerra and tell him to call Peter Mengrone and tell him it was okay?
> A: I don't remember.
> Q: That's possible?
> A: Yes, Sir.
> A: . . . we told Louis Guerra that everything will be all right, and Louis Guerra took it upon himself to talk with Peter Mengrone. (696-697)

3. The Nature of the Transaction— At Its Inception

That the Lucas-Mengrone deal resulted in a rip-off is undisputed. However, at issue was the question of whether there were any intentions by Rossi to consummate a legitimate deal. [26]

Rossi testified at trial that the deal was legitimate at its inception but testified that at the receipt of the $30,000 in $5 and $10 bills:

> At that point, I knew all that Mr. Lucas told me wasn't true, that Mr. Lucas told me he had out of town customers . . . and I knew that Mr. Lucas didn't have a large amount of money and I put in the back of my mind that I wasn't going to do legitimate business with him that I was going to beat him, which I did. (341)

Pearson testified, however, that Coraluzzo, in complaining

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26. This issue was raised repeatedly by defendant Guerra to the Court as the basis for a motion precluding the admission of more than 50 taped conversations on the grounds that Guerra's statements in the tapes could not be taken at face value since they were a "scam" in a theft of money.

about Rossi's weird behavior, told him:

> I don't know what's wrong with Albert . . . but this was a rip-off from the beginning, he knew it . . . (1071)

In addition, Rossi admitted that prior to Rossi's receiving money from Lucas-Mengrone, his partner, Ernest Coraluzzo, had already ripped off money from Mengrone.[27] (683)

Furthermore, the taped conversation dated September 14th, 1973 (SA207) shows Rossi telling Mengrone the transaction was a rip-off from the beginning.[28] (698).

4. The Transactions as Shown by the Taped Conversations

On September 7th, Rossi tells Mengrone that he is ready for an immediate deal, and that heroin can be delivered as soon as Mengrone has the money.

> Rossi: I got two guys from Mulberry Street that are looking to take, they want me to go downtown right now. (SA49)

Almost immediately, Rossi's ready-willing-and-able posture is shown to be false. Coraluzzo has rushed to Mengrone's home with the news that the deal is not legitimate (SA53-54). Louis Lepore, at 7:50 that evening, subsequently calls Mengrone to say that "the money is all garbage money," and must be checked before the deal can go through (SA56). Mengrone's response is that he has $200,000 bank money immediately available for the deal, and he states that he hopes Lepore and Rossi make a liar out of Coraluzzo who has "just stormed out." (SA56)

On the evening of the 8th, Mengrone calls Guerra, having been given his number by Ernest Coraluzzo (SA145). Guerra

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27. Rossi replied that it was possible for his deal to be "honorable" with Mengrone while his partner had already ripped off Mengrone since "something wasn't right as partners." (683) Yet, the Pearson-Coraluzzo exchange took place at Rossi's parent's home. (1071)

28. It is of impact to note a contradiction in Rossi's legitimate business posture. In court, he said it was lack of money that made him decide to beat Lucas, but in the taped conversation, Rossi states it was a beat *until* he found "There was really something around."

says that he first learned of these proceedings in the early afternoon of the preceding day. As the tapes show, Louis Guerra's role is to alleviate Mengrone's fears regarding this transaction, to persaude him not to involve his "uncle" and to solicit additional money for the deal from Mengrone. Thus, Guerra initially is very defensive of both Coraluzzo and Rossi, assuring Mengrone that the $30,000 is still good, and that Al is "breaking his hump to get this thing together." (SA61-62).

Ernie's receipt of the $5,000 from Mengrone is explained to be the start of the transaction. (*Ibid.*)

Guerra calls later that evening to find out whether or not Mengrone is going to call his "uncle."[29]

> Guerra: Cause the way everybody is telling me now, that your uncle is in it because we are trying to give you a beating. (SA75)

Guerra is full of assurances and says: "No, there is not going to be a rip-off" (SA79). Guerra suggests over and over again that another $15,000 will make the deal good (SA85-86). It is also Guerra who breaks it to Mengrone that Coralluzzo has ripped him off of the original $5,000 (SA86) and later alleges that a feud between Coralluzzo and Rossi is the reason for Mengrone's predicament. (SA107)

By late afternoon on the 9th, Mengrone has not been able to locate Rossi and solicits Guerra's help. (SA98-99; SA100-1) Through a series of phone calls early that evening, Guerra is able to assure Mengrone that "Al" will be located, and further, that Browning thinks Mengrone will be able to get back his money from Coraluzzo.

More money from Mengrone to Rossi is still presented as the key to consummating this deal (SA106-109) and that Mengrone must forget about the money that Coraluzzo owes him in order to complete the transaction. (SA112)

By September 9th at 7:35 p.m., Guerra is able to tell

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29. Mengrone's uncle remained elusive and unidentified throughout the trial and is not mentioned except for the references in the tapes.

Mengrone that Rossi will meet with him (Mengrone) within an hour.

> Guerra: I don't know what he'll have with him, whether money, goods, or story. (SA114)

Mengrone meanwhile is developing problems with his people because of the failure of the deal to go through, and tells Guerra that one of his "family" will be held until the situation is rectified (SA119) and that his wife was in a "fucken state of shock." (SA125)

It is late morning of September 10th that Guerra first tells Mengrone that his money has been stolen, and that the goods to be delivered "would have made some nice pancakes."

> Guerra: I've [I] heard some stories and I've been beat, and I think you're going to be beat. (SA145)

Guerra appears to be very apologetic that his intermediary role served to stall Mengrone by constantly telling him to "take it easy". (SA147) Guerra also offers to take Mengrone's son to protect him. (SA152) Guerra asked Mengrone not to reveal that he told Rossi that it was a rip and that the package contained pancake mix and not heroin, but will not tell Mengrone where Rossi's hotel is. (SA146-147)

Later the same evening, Mengrone says his son has been kidnapped and his wife will call the police and the F.B.I., and that she has everybody's phone numbers (SA155). Guerra commiserates with Mengrone about the frenzied situation, and that "Rossi is crazy." Guerra provides Mengrone with a gun. (SA171, SA178, SA159, SA163) Even at this point, Mengrone complains that he would have made good on the deal, and that it was stupid of Rossi to have taken the thirty grand. (SA193-196) Guida meanwhile corroborates what Louis Guerra originally told Mengrone, that is: that the rip-off was due in fact to a feud between Rossi and Coraluzzo (SA193). With this in mind, Mengrone is first soft with Rossi, and then Coraluzzo, the purpose of which is to get his money back.

Mengrone admits to Rossi on September 14th that Braciole was not sent to Rossi's home (SA201) and professes to accept Rossi's explanation that he failed to contact Mengrone to make the sale because "people told him not to see anybody." (SA200-

201). Rossi tells Mengrone that Coraluzzo owes him $67,000 and laughingly brags that the whole deal:

> from the beginning, was supposed to be a beat, and when I found out that there was really something around, I said, What do you want to beat this guy for? (SA207)

Later the same day, on September 14th, Mengrone plays the other side and agrees with Coraluzzo that Rossi is a "psycho" (SA214) and that he is "lying, cheating," etc. (SA219) Guerra, meanwhile, has told Mengrone that Coraluzzo's role in the proceeding with Rossi was a joint rip-off.

> Ernie set it up for a rip in the beginning . . . right from the beginning, you were made, you were had. (SA269)

A week later, on September 25th, Mengrone is begging both Rossi and Coralluzzo to return the money. To Rossi, he states that he is "flat busted broke" and wants Rossi to "dig into his bag." (SA228). To Coraluzzo, Mengrone for the second time implies that Rossi is trying to involve Coraluzzo's father in the rip-off and admits to him that he had lied about his son being kidnapped. (SA220)

5. Browning and Lepore's Role as Indicated by the Tapes

Louis Lepore called Peter Mengrone on September 8th and is sympathetic with Mengrone's situation and he states that he doesn't know "what's going on." (SA64). Browning similarly calls on September 8th and is sympathetic to Mengrone's claim that the deal would be good. (SA66). Browning subsequently calls Mengrone in the early morning of September 10th to tell Mengrone that he doesn't know what Rossi is doing, and that he should stay in touch with Guerra.[30] (SA127).

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30. Compare these facts from the transcript: (1) that Browning is the person who makes up the pancake mix; (2) that Louis Lepore is told by Rossi to call Mengrone to tell him that money is no good.

6. Guerra's Relationship to Rossi and Coraluzzo and to the Drug Business as Indicated by the Tapes

Guerra complains to Mengrone on two separate occasions that his relationship to Rossi is that of a problem-solving man, as a gun-man, who is called upon to mediate sundry situations. Guerra explains to Mengrone that:

> The only time they [Rossi and Coralluzzo] call me is when they got to bring out the gun . . . when they had Big Jim in the up over on 69th Street or something like that, they were holding him in a motel, that's when they call me. We got trouble, the only time I hear from them, when we got trouble. (SA61)

Several days later, while commiserating with Mengrone about the potential kidnap of his son, Guerra states:

> The only time he [Rossi] calls me is when he's in trouble and he wants somebody to talk in front for him so he doesn't have to show up. I only know Al a few months, but this is what happens. (SA262)

The tapes show Guerra to be an unfamiliar figure to Peter Mengrone. It has already been noted that Mengrone first got Guerra's telephone number from Ernest Coraluzzo. Guerra is also referred to by the various parties in each of the phone conversations as the "insurance man" and is customarily identified by last name, unlike most of the others who call back and forth. The record is also ambiguous, at best, about Guerra's relationship to drug deals. In the midst of the discussion whether or not Mengrone is being ripped off by Rossi, a conversation ensues as such:

> Mengrone: After this, I'm going to tell you something, you want to deal directly with me?
>
> Guerra: I can't. I gotta get to, all right, you deal with me and I'll deal with Al.
>
> Mengrone: I'll deal with you and you deal with Al. And all I want is the stuff delivered when it's supposed to be. (SA84)

It is unclear from the conversations whether or not this

discussion relates strictly to the deal between Lucas, Mengrone and Rossi, or whether it deals with future transactions.

After it's becoming apparent to Mengrone that he's been ripped off, Guerra begins a series of discussions with Mengrone indicating that he's been ripped off and stuck for money by Rossi as well. On September 9th, Guerra says that he is

> in so deep . . . I just want to see things start to move . . . I'm stuck for over $30,000 already. (SA117)

and later goes on to state that he also has been beat, that he is out some $30,000 from "grass and shit like that", paying for plane tickets, loaning Rossi money in order to party, and another $11,000 which is supposed to go to Italy. Guerra further states:

> I'm reaching out to my old connections, I'm getting back with the people I was with, now if you still have any confidence in me . . . but if you can get straightened out, I think you and I could do something and make money." (SA145)

In the same vein, on September 12th, after it's clear that the money-drugs exchange is never going to happen, Guerra tells Mengrone, "[a]ll I know is I'm trying to get some of the cigarettes back, because I'm out a ton of money." (SA180). A month later, on October 8th and October 10th, in conversations with M[illegible]e, Guerra indicates that he can't seem to locate any drugs, that he has some grass, but there is no coke available. "Everyone is paranoid in New York." (SA251, SA273).

7. The Language and Content of the Taped Conversations

The taped conversations played for the jury for two full days. Almost the entirety of the fifty-odd conversations were between the defendant Louis Guerra and Peter Mengrone. The conversations were not schoolroom discussions, nor even clinical discussions of a narcotics deal. Rather, the conversations were replete with obscenities, racial slurs, and an assortment of

violent behavior—use of guns, beatings, and kidnapping.[31]

After the first set of tapes were played, defendants Cimmino, Crea and Bivens immediately made motions for severance on the grounds of prejudice. (1338)

After another series of tapes, counsel for defendant Cimmino renewed his application for severance stating for the record:

> During the playing of these tapes I have notices on at least three occasions — the ethnic and racial slurs on these tapes are outrageous — and I have noticed that at least 2 or 3 jurors have been effected to the point, where they have taken their earphones off, looked at Mr. Guerra, and have been shaking their heads. (1382)

The Flynn Rip-Off

On July 14th, 1973, Rossi met with Angelo Iacono[32] in Miami at the J & R Lounge and later in the Trojan Lounge. Present at that meeting was Capotorto, Rossi, Rossi's wife and sister-in-law and Robert Browning. (185). Iacono informed Rossi that he was receiving some 2,500 pounds of Columbian marijuana and asked if Rossi was interested in buying some. Iacono said that his partner, Franklin Flynn,[33] had connections which enabled him to get cocaine in from South America. (186). Rossi told Iacono he was more interested in the coke than the marijuana. (187).

At another meeting at which Flynn, Iacono and Roger Silverio and Capotorto, as well as Rossi, were present, Flynn stated that he could get vast quantities of cocaine, but didn't know whom to sell it to. (187-8). Rossi told Flynn that he would buy all the cocaine Flynn could get. (188). Rossi stayed in

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31. Rossi is referred to as "that spic" (SA 39, SA 41), Mengrone's partner/boss, Frank Lucas is called "tar baby", "shines" (SA 119, SA 152, SA 181) and "nigger." (SA 140)

32. Angelo Iacono is indicted co-conspirator.

33. Franklin Flynn is indicted co-conspirator.

Florida a month, having fled to New York State on a parole violation. :188-9).

Back in New York City, Rossi met with Coraluzzo at the Cafe Ferrara during the time of the Feast of San Gennaro, telling him about the Flynn deal, stating "that it was going to be a very big score." (339-340).

Flynn called Rossi on approximately September 21, 1973 to tell him that Iacono was coming to New York with the "goods". (190). Rossi, along with Capotorto and Guida, met Iacono at Kennedy Airport. Iacono told Rossi that he had the goods. They went to the Van Cortlandt Motor Inn in the Riverdale section of the Bronx, and tested an ounce of the cocaine which Iacono had brought with him. (191).

After telling Iacono that he would buy more cocaine, Rossi called Coralluzzo, who got in touch with other individuals, in particular Browning, Pearson,[34] Louis Lepore, James Angley and DeLuca. (195-6). They all met at Rossi's mother's house that evening, and discussed the plans for the Flynn "deal." (195-6).

Rossi testifies that "Ernie and I told them we were going down to rip-off cocaine." (196). At his mother's house, the plan for the rip-off, and $10,000 guaranteed payment to all those involved was discussed. (197, 913). Rossi provided the money and tickets and the above-mentioned people all took a plane to Florida. (197-199).

On September 22, 1973, after arriving in Ft. Lauderdale, Florida, two rooms were rented in the Diplomat Hotel and another room rented in the Hotel Hemisphere. (201). Later on, Rossi, Coraluzzo, Pearson and Louis Lepore met with Flynn. Coraluzzo and Rossi talked to Flynn, indicating that they wanted a sample, and that Rossi's "partner", that is, Coraluzzo, kept on asking Flynn where the goods were. (203). The following afternoon, Rossi told Flynn that they were coming to the B&G Lounge. There, Rossi and Coraluzzo met Flynn, Silverio, and Iacono. Rossi testified that Flynn said, "the coke is

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34. Pearson also testified in minute detail as to the Flynn rip-off. His accounting of the facts was fundamentally the same.

here, but we're not going to give it to you without money up front." (204).

They all agreed that the same evening Flynn would bring the coke to Rossi, Coraluzzo, Pearson and Lepore. Rossi, Coraluzzo, et al., then went back to the hotel, checked out of the Hotel Hemisphere, went to the Diplomat and wiped all the prints out of the room. (206).

Flynn came to Rossi's room in the Hotel Diplomat and said that he had the goods. Rossi and Coralluzzo had Rossi and Iacono come into the room. Browning and Pearson were sent down to get another individual who was waiting in the car. Silverio was brought to Rossi's room. Browning was introduced as a chemist and when they opened the suitcases and saw that the cocaine was there, Rossi, Coraluzzo and the others all pulled handguns and announced that it was a stickup. (207-8).

Rossi, Coraluzzo, Louis Lepore and Pearson then went to the car, and Browning and DeLuca tied up the three individuals. Rossi and Coraluzzo carried the suitcase full of cocaine and put it in the trunk of Flynn's car. (209-210). They waited there for Browning and DeLuca, and then went to the holiday Inn in Ft. Lauderdale, where a limousine was waiting to pick them up. They transferred the suitcase from the car to the limousine and went to West Palm Beach, where Pearson, DeLuca and Browning stayed at one hotel, and Rossi, Louis Lepore and Coraluzzo at another. (212).

They subsequently took an air flight to New York City, having first called Marilyn Greco and informing her that they were coming to New York and that she should meet them at the airport with a limousine. (212). The airport had been called and reservations made for six to New York. They left from West Palm Beach, the suitcase was placed in the trunk of a taxi, they checked the two pieces of luggage at Kennedy, and Marilyn Greco and Cathy Spangler met them. Louis Lepore, Joseph DeLuca, Pearson and Browning were told by Rossi to get the suitcases and to bring them to Rossi's mother's house. Rossi, Coraluzzo, Cathy Spangler, Marilyn Greco got in the limousine and arrived at Rossi's mother's house, and then took the cocaine to 113-115 Heights Drive in Yonkers, New York. (214). Rossi, Coraluzzo, Spangler and Greco all went in. Cathy Spangler and

Marilyn Greco were told to buy a sealing machine and heavy duty plastic bags. (214).

Jerry Rubin was called by Rossi to come and test the cocaine, and when Rubin and a man by the name of Cochise arrived, they were "astounded, because we had all the cocaine in the master bedroom of the house — it was just like a big mess." (215). After the coke was tested, it was packaged and placed in a valise, and the valise put in the attic. (218). Rossi and Coraluzzo did most of the packaging, with some help in holding of the bags by Cathy Spangler and Marilyn Greco. Initially, the cocaine was first put on the floor of the attic, and then in a trap-door, (224) and it was left in that place for some period of time between a day and a week. (220)

Coraluzzo informed Rossi that it was not a good idea to keep all the cocaine in one place (221), and it was decided that it would be brought to his mother-in-law's house. Some ten 15-ounce packages were put in an attache case, and Rossi and Coraluzzo met Mrs. Coraluzzo in the vicinity of Yonkers, whereupon Coraluzzo gave his wife the attache case and she placed it in the car. (222)

Distribution of the Cocaine from the Flynn Rip-off

Trial testimony on the subsequent distribution of the cocaine stolen from Flynn is recorded on over 100 pages of testimony. Much of it involved a series of maneuvers and a cast of characters which, at best, were confusing and complicated. Only the outlines of these transactions are summarized herein.

Rossi testifies that sometime after the Florida trip, he called Guerra, who told him that he could move some cocaine. (234) Coraluzzo and Rossi went to Guerra's apartment and, in his den, weighed packages of coke, and in return for giving Guerra two 15-ounce packages of cocaine, they received $10,000 in cash. (244-5, 651)[35]

Sometime at the end of September or early October, 1973, Rubin met with Rossi and Coraluzzo at Marilyn Greco's house.

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35. This transaction was the basis of the substantive count against defendant Guerra. The jury acquitted him on that charge.

Subsequently, Rossi and Coralluzo gave DiGeorgia, who represented Rubin, two 15-ounce packages, and a day later, DiGeorgio gave Rossi and Coralluzzo $20,000. (229)

Another sale of two 15-ounce packages was made to DiGeorgio and Rubin for $10,000. These couldn't be sold, and were returned "touched," that is, a little short. (232)

In intricate detail, Rossi testified to negotiations and distribution of cocaine to Cimino, George Toutian, Louis Lepore[36] and DeLuca. (232-241) Through Charles Guida, Rossi made arrangements for the resale of a 1/4 kilo of cocaine to Bivens, for which Rossi never received payment. (248-9) One-half kilo of cocaine was sold to Cosme with Pearson as the intermediary. (250-2)

In late October, 1973, Rossi learned of a Bronx County indictment against him and made plans for secreting the remainder of the cocaine while maintaining himself as a fugitive. (254-264) Rossi testified that while a fugitive, he continued to carry out drug transactions by using James Angley, "Sally Goose," Maria Marrero,[37] and Susana Sherman. (264-8) Marrero and Casey,[38] sold a 1/4 kilo of cocaine on Rossi's behalf, (268-70) and later sold a kilo for him in Boston. (274-6)

Joseph and Louis Lepore were given a kilo of cocaine for sale. (271-3, 275)

In November of 1973, at the time he surrendered on State charges and posted bail, Rossi met with Arnold and Guida to discuss buys of cocaine. (288-293)

After extensive negotiations in mid-September/early October, a large deal with Crea and Artuso was quashed. (293-298) In mid-December, 2 kilos were sold to them for $15,000. (297-306)

A kilogram deal in mid-December with Angley as intermediary (308) was scheduled, involving Guida, John Serrano, and a police informer named Roberto. The deal never went

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36. Toutian is an unindicted co-conspirator.

37. Maria Marrero testified for the prosecution. (1405-31; 1444-59)

38. Casey is an undicted co-conspirator.

through because law enforcement officials "started to close in on them" at the point where the buyer was being given a sample.[39] (308-313)

After this attempt to sell cocaine to Serrano, Guida told him he had another customer, Arnold. (313-4) The subsequent sale of a kilo netted Rossi $12,000-$13,000. (316)

Pearson-Guerra Deals

Gary Pearson testified during the trial that he had conducted six transactions with Louis Guerra during the period of late July to October, 1973, in heroin, cocaine, and marijuana. (1007) The first such transaction was mid-July, about which Pearson states, "I had spoken with Louie about receiving or the possibility of buying or selling narcotics *between ourselves.*" (Emphasis added) (1008) Louis Guerra consigned one ounce of coke to Pearson, who received delivery in the vicinity of the Bell Bottom Blues Boutique. A week or two later, Guerra received $1,000 in payment. (ibid)

The second Guerra-Pearson transaction took place at Guerra's request. Purportedly, Guerra had a customer he wanted to get restarted in business,[40] and needed heroin to help this person pay back money he owed to Guerra. The purchase was an 1/8th kilo of heroin, the source of which was John SiDalvo.[41] Guerra paid $3,500. (1008-9)

At this time, Pearson reported that Guerra said he was disgusted with Rossi and Coraluzzo since they "took him through the wringer financially," and that they were "wild cowboys." (1010)

The third transaction with Guerra, at the end of July, was the receipt by Pearson of ten pounds of marijuana from

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39. At trial, John Serrano and Detective Muniz testified as to the maneuvers in meeting and setting up the buy. (1122-25; 1156)

40. This customer remained unknown throughout the course of the trial.

41. John DiSalvo is an undicted co-conspirator.

Guerra.[42] The marijuana was delivered at Guerra's house. Pearson drove past Guerra's house and parked his car down the block. Guerra took two plastic garbage bags from the trunk of his car and placed them on the trunk of Pearson's car. Pearson placed them in his trunk. (1012) During the negotiations for the marijuana, Guerra told Pearson that Rossi and Coraluzzo owed him $30,000 for previous cocaine transactions, the source of which was from California. (1093-4)

In August, 1973, sometime before the Florida trip by Pearson's estimation, (1013) Guerra asked Pearson if he would get a 1/2 kilo of coke to Guerra's contact in the "Village," at the Ninth Circle Bar. Pearson obtained the 1/2 kilo from Jerry Rubin, on consignment, but the deal didn't go through. (1014) Pearson was upset with Guerra because the deal failed to go through, given the inconvenience of the trip and the difficulties of procuring the cocaine from Rubin. (1014-5) Guerra told Pearson that he'd make it up to him, but "he wouldn't give me the name of the party who was putting the transaction together, or who actually was the runner of the people downtown." (1015)

Guerra, in the month of September/October, 1973, ordered a 1/2 kilo of heroin for customers that Pearson had seen in the "Village" sometime earlier. Pearson met Guerra aa the Boston Post Road, and told Guerra that he would try to get the 1/2 kilo of heroin. $5,000 was paid to Pearson in his home, and Pearson testified that the source of this heroin was John DeSalvo. (1018)

Guerra told Pearson that he was moving coke from Florida. Guerra had received 1/2 kilo from Rossi and Coraluzzo towards payment of money owed him.[43] Pearson said he needed cocaine and couldn't get in touch with Rossi or Coraluzzo, and wanted Guerra to sell him the coke. There was no transaction, since Guerra said he had another customer for the cocaine. (1019-20)

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42. Testimony was also elicited from Pearson that Rossi and Coraluzzo were in on the grass deal. (1010-11) Pearson also went on to state that he assumed the three of them (Rossi, Coraluzzo and Guerra) were partners in getting cocaine from California: "I guess it was an assumption on my part that the three of them were together." (1012) Defense motion to strike this testimony was granted. (1012)

43. Note that Rossi testified that Guerra *paid* Rossi and Coraluzzo $10,000 in cash for two 15-ounce packages of cocaine. (244-5; 651)

POINT I

PROSECUTORIAL TACTICS AND STRATAGEMS WERE CALCULATED TO DEPRIVE GUERRA OF A FAIR TRIAL

This case is an example of prosecutorial misuse of the stratagem of conspiracy prosecutions. The advantages to the government in prosecuting under a conspiracy theory are numerous: the admissibility of hearsay declarations, acts of unindicted persons, conviction on uncorroborated testimony of accomplices, conduct far removed in time from the dates of substantive offenses and the inevitable confusion between counts and defendants. See *Krulewitch v. United States*, 336 U.S. 440, 451-58 (1949).

It was with an eye to those advantages that the prosecutor initiated this indictment in clear violation of Rule 8(b) which allows joinder of defendants only where there are one or more counts "linking all the defendants and all the offenses," *Schaffer v. United States*, 362 U.S. 511, 516 (1960), citing *McElroy v. United States*, 164 U.S. 76 (1896).

It was at the outset of the trial that defense counsel discovered, in the midst of the masses of 3500 material just delivered to them, a report from Special Agent James Harris of the Drug Enforcement Administration dated June 21, 1974.[44] The report outlined the parameters of two separate conspiracies. Conspiracy #1 revolved around the Flynn rip-off and was the basis of indictment 74 Cr 620. Conspiracy #2 was called the "Guerra Conspiracy" and involved cocaine sales by Guerra to Rossi and Coraluzzo for sale to Samuels, Capotorto, Camperlingo, Thompson, Ripulone, and Bertolotti (A142).

At the conclusion of the report was the following:

> "A number of the defendants in Conspiracy #1 appear in Conspiracy #2. Assistant United States Attorney Lavin,

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44. The report is printed in full at A141-2. It was marked at trial as Guerra's Exhibit "A" for identification, and was received on behalf of all the defendants (32).

> SDNY, may decide to merge these two conspiracies by using the evidence in Conspiracy #2 to support the more extensive Conspiracy #1." (A142)

Thus it was that 17 defendants (a fraction of the 29 indicted co-conspirators and 31 unindicted co-conspirators) proceeded to a 3-week trial. They were subjected to the "niceties" of a conspiracy prosecution without the prosecutor ever having to explain on what awful theory it was decided to prosecute these two narcotic conspiracies as a large, single conspiracy.[45]

Situations comparable to this, although less grotesque in their perversion of the law, have resulted in the well-known but unheeded warning to the Government[46] enunciated in *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974),

> "We take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy charges one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the clain of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top."

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45. The court would not rule on the motion for dismissal for multiple conspiracies made by the defendant on the grounds that Agent Harris' theory was not binding on the government and that it was premature (31). Nor would the court permit cross examination on the report, thus taking the information from the jury for consideration.

46. In fact, the original indictment in this case, 74 Cr 620, filed July 18, 1974, was subsequent to argument in the *Sperling* case where the court first issued its warning and the government indicated that it would not continue large-scale indictments. Moreover, this case proceeded to trial on a superseding indictment, 75 Cr 5 filed January 6, 1975, after the *Sperling* decision. It should also be noted that the Assistant United States Attorney on the case at bar, James Lavin, also participated in the *Sperling* case. It is perhaps the time for the warning to the government to bear fruit.

See also, *506 F.2d at 1340-41, United States v. Miley,* —— F.2d—— (2d Cir. 1975), No. 536-40, decided March 19, 1975.

At the outset, this gross case of misjoinder sent the defendants to trial with only an inkling of the charges against them. The indictment on which they proceeded to trial, 75 Cr 5,[47] was comparable to superseded indictment 74 Cr 620 in that it gave notice only of the Flynn conspiracy (Conspiracy #1 in Harris' report). Moreover, the government followed a policy of suppressing all notice of the content of the charges in such a manner that not only were defendants restricted in pre-trial preparation, but they were left open to being totally surprised as to the critical issues of the prosecution.

Although discovery motions for a list of additional overt acts in furtherance of the conspiracy were made by defense counsel in October, 1974, no such lists were prepared by the government at the date of trial, January 7th.[48] The failure of the prosecution to disclose left the defendant Guerra unaware as to the following:

(1) introduction of testimony about heroin and marijuana as transactions in furtherance of the conspiracy;

(2) Pearson-Guerra deals;

(3) All transactions prior to the fall of 1973.

In similar fashion, despite pleas from the court that the government turn over "3500" material early, before trial, it was not until the eve of the trial that the defense received hundreds of pages of material. The government further compounded the difficulties of trial preparation by its withholding of 3500 material on witness Gary Pearson until after cross-examination of witness Rossi was well under way,[49] thus depriving defense of

47. Despite the new indictment, the trial court denied all motions for continuances, discovery, and severance.

48. At the pre-trial conference on October 3, 1974 (Oct. 3rd, 12), the defendant believed the government had agreed to furnish such a list. At trial date, the Assistant United States Attorney and the court had another interpretation (20-24). The court denied a defense motion to preclude the government from introducing into evidence Overt Acts not made known to the defense in the Bill of Particulars or the indictment (24).

49. Note the request for this material by counsel on the 2nd day of cross-examination of Rossi. (517)

the opportunity to cross-examine Rossi on points which Pearson was to testify.

The failure to provide this material to the defense in a case of this type and size is tantamount to denying the defendant his right to effective cross-examination and confrontation as contemplated in *Brady v. United States*, 373 U.S. 83 (1963), *Bruton v. United States*, 391 U.S. 123 (1968).

The government also failed to meet its obligation under *Brady* and attempted to suppress evidence favorable to the defense. In a manner characteristic of his conduct throughout the trial, the prosecutor did not voluntarily turn over to the defense Pearson's letter to the government enumerating his demands in exchange for cooperation (A311). It was only because Pearson inadvertently referred to the letter during cross-examination that the defense learned of its existence (1059), and demanded its production (1061). It should be clear to this Court that this letter had the potential of critical importance to the defense in that it exposed Pearson as someone other than the rational, calm, lucid man who appeared on the witness stand. In fact, the letter showed Pearson as one who wanted to have the government use perjured to fix trials without having the court or jury informed and that no judge would know the contents of this agreement.

In similar fashion, the handwritten note from DEA Agent Lough stating that Rossi told him that he had brought cocaine to Florida *himself* for sale to Samuels (as opposed to being sold by Guerra to Lombardo, as testified to at trial) was not turned over to defense as "3500" or *Brady* material. Rather, the defendant obtained it only after other counsel after cross examination discovered the existence of handwritten notes by agents and requested that those notes be turned over to the defense (462, 469, 480).

These attempts by the prosecutor to deny defendants knowledge of the scope of the offense for which they were being charged and tried, as well as the attempts to suppress "3500" and *Brady* material, are probative of the manner by which this case was prosecuted.

As will be demonstrated throughout, the prejudice to the defendant as a result of being tried for alleged participation in

multiple transactions on a single conspiracy theory is cumulative.

Guerra's prejudice is that of a defendant who was convicted by the sheer weight of prosecutorial advantage gained by misuse of the conspiracy theory. Guerra's prejudice is that of a defendant whom, if tried separately on charges based on each of the several drug transactions in which he was implicated, would have most certainly been acquitted. Indeed, in the single instance where the charge against him was clearly delineated (the substantive count), Guerra was acquitted by the jury. The government was able to get a conviction only by prosecuting on a theory which would not turn on whether the jury believed Rossi. Indeed, as will be discussed under Points III, IV and V, the prosecution made full use (or more correctly stated—abuse) of the conspiracy theory to introduce evidence misrepresented to the court and jury as being in furtherance of the conspiracy. Thus, under the guise of being probative of the conspiracy, rumors, innuendo, unrelated transactions and sham conversation were admitted into evidence.

The cumulative effect of the prosecution's policy of attempting to suppress "3500" and *Brady* material, creating surprise and misrepresentation of evidence was the conviction of Louis Guerra on the conspiracy count.

POINT II

MULTIPLE CONSPIRACIES WERE ESTABLISHED AS A MATTER OF LAW

What was lost sight of in this prosecution is the central theory of conspiracy law, that is, the *common agreement* between the conspirators.

> "The basic difficulty [in determining if single, or multiple, conspiracies exist] arises in applying the Seventeenth Century notion of conspiracy, where the gravamen of the offense was the making of an *agreement* to commit a readily identifiable crime or series of crimes, such as murder or robbery . . . to what in substance is the conduct of an illegal business over a

> period of years. There has been a tendency . . . 'to deal with the crime of conspiracy as though it were a group [of men] rather than act' of agreement . . . Although it is usual and often necessary in conspiracy cases for the agreement to be proven by inference from the acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant."

United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965) (Emphasis in original)

What the facts demonstrate in this case, even when viewed in the light most favorable to the Government, *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), is a series of criminal acts, some involving dealings in narcotics drugs, others "rip-offs" of money under the guise of "legitimate" drug deals, which are orchestrated by Ernest Coraluzzo and Albert Rossi.[50] The relationship and functions of the parties to these criminal acts are not such as to establish an "integrated loose-knit combination" which creates the lawful inference of a single conspiracy, *United States v. Bynum*, 485 F.2d 490, 495 (2d Cir. 1973); *United States v. Sperling, supra*, 506 F.2d at 1340.

The Rossi and Coraluzzo operations are not a "chain conspiracy, . . . dictated by a division of labor at the various functional levels." *United States v. Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), cert. denied 372 U.S. 959 (1962)

There are not in our cast of characters individuals who perform the defined functions of an on-going commercial venture, i.e., exportation from a source outside the country, importation, adulteration and packaging, distribution to sellers, and ultimate sale to narcotics users. *United States v. Agueci, supra*, 310 F.2d at 826, *United States v. Miley, supra* (2388).

The Court in *Agueci* explained,

> ". . . it was enough to make [certain appellants] members of the overall conspiracy that the success of

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50. Rossi and Coraluzzo stole manite from a doctor (181-2), money from Samuels, Matthews, Lucas, Mengrone (*supra*) and the Sealtest Milk Cor. (115-6), cocaine from Flynn, and marijuana from Capotorto, Thompson, Camperlingo and Bertolotti. (*supra*)

> their 'independent' venture [adulterating and selling narcotics] *was wholly dependent on the success of the entire 'chain'*. . .

310 F.2d, at 826-7 (emphasis added)

See also, United States v. Bruno, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939); *United States v. Aviles,* 274 F.2d 179 (2d Cir.), *cert. denied,* 362 U.S. 974 (1960); *United States v. Miley, supra.*

Nor is this the type of operation that leads to the inference that separate transactions between only several of the alleged conspirators can be viewed as part of a single conspiracy because they represent "two or more chains connected to a hub by core conspirators." *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974); *See also, United States v. Sisca,* 503 F.2d 1337 (2d Cir. 1974); *United States v. Bynum, supra; United States v. Arroyo,* 494 F.2d 1316 (2d Cir. 1974).

To sustain a finding of a single conspiracy under that theory, the *scale* of operations must be of such a level as to permit the inference that a person at a particular level must have known that others were performing similar roles, i.e., several suppliers-importers and different groupings of distributors.

> "In view of the large amounts of hard drugs involved and the large amounts of money advanced to suppliers, there is no question but that the Bynum-Cordovano partnership was conducting a regular business on a steady basis with numerous suppliers who intentionally and knowingly were either looking to or maintaining a close relationship with a solvent, on-going apparatus." *United States v. Bynum,* supra, 485 F.2d at 497.

See also, *United States v. Arroyo, supra,* 494 F.2d at 1318, 1319; *United States v. Sperling, supra,* 506 F.2d at 1340-43.

In fact, the evidence shows that what we have here are penny-ante rip-off artists and drug dealers who do not engage in the drug trade as a well-functioning business,[51] with a clear

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51. The record makes clear that the business that Rossi and Coraluzzo engaged in was that of making a buck—by whatever means possible, including robbery, larceny, assault, and drug dealing.

division of labor, but who engage in the drug trade as opportunities fall their way.[52]

In this regard, a few points of fact can be illuminated. Rossi's early 1973 "deals" with Samuels and Matthews were both *thefts of money.* With the exception of the Rossi-Coraluzzo partnership, there were no common players. The source of the drugs to be produced for the "sales" differed. Guerra purportedly supplied the 2 kilos of coke for Samuels,[53] while the source for the Matthews deal was to be the mysterious "Dom Boy" and Louie, those unknown, unreachable sources of 50 kilos of heroin.

The Lucas-Mengrone rip-off in early September had the same quality to it. It is an act that stands alone. No narcotics were bought or sold and Rossi could only make reference to "Dom Boy," "Louie," and the guys "downtown" who were to provide him with the heroin. Louis Guerra, the man accused of being the "main supplier" of narcotics to the conspiracy, is in this instance a distributor of heroin.[54]

The Flynn "rip-off" and the resultant distribution of cocaine represented another independent transaction involving a different grouping of people in carrying out a theft of cocaine. Louis Guerra, the alleged main supplier of cocaine to this conspiracy, was involved in neither the actual theft *nor* the preparation for it.[55] (651) According to the prosecution's

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52. This is not to imply that persons of this ilk should not be prosecuted, but only that attempts to lump several small-time operations together as a large single conspiracy becomes violative of the defendants' fundamental rights to a fair trial.

53. Whether Guerra actually supplied the coke to Rossi for the Samuels deal was questioned extensively by defense. No reason was given for failure of Rossi to make the deal legitimate, nor was there any testimony on Guerra's role in a rip. Moreover, Rossi had made no statement to DEA agent Lough in April of 1974 (A310) that *he*, Rossi, had brought the cocaine to Florida himself.

54. For the purposes of this argument only, we will deal with the Lucas-Mengrone rip-off as the government presented it. See the discussion *infra.*

55. In fact, one of Rossi's first conversations with Coraluzzo about the Flynn "deal" occurred on the night of the large meeting discussing marijuana at the Cafe Ferrara. Although Guerra was present for the marijuana discussions, Rossi met *privately* with Coraluzzo to discuss the Flynn rip-off. (648-50)

theory, Guerra bought one kilo of the cocaine stolen from Franklin Flynn. The jury acquitted Guerra of this charge.

These rip-offs of money as well as the subsequent theft of cocaine from Flynn were unconnected events. They were *not* "part and parcel of the single drug conspiracy charged in the indictment." *United States v. Bynum, supra,* 485 F.2d at 498. This is not the situation of the Bynum-Cordovano group, which

> ". . . conduct[ed] an enormously profitable business . . . faced early in 1971 with a shortage of heroin and cocaine. They discussed this with their suppliers and were desperately seeking new sources of hard drugs. The planned theft . . . was to supply heroin for the purpose of the conspiracy . . . The aborted Washington burglary was conceived by Cordovano and Bynum for the purpose of obtaining heroin and money . . . The suppliers here were acutely aware of the shortage, that the "core group" would resort to violence to secure hard drugs or to protect the venture, could hardly be unanticipated or unexpected."
> 485 F.2d at 498

In contrast to that situation, here there was not a shred of evidence adduced at trial to show that the rip-off of manita (181-2) bore any relationship to processing of heroin by Rossi or associates. And, unlike the *Bynum* situation, here there was no testimony that the money stolen from Samuels, Matthews, Lucas and Mengrone was planned to fund a bankrupt narcotics operation, or that the Flynn rip-off was motivated by a tight supply of cocaine.

In short, no evidence was presented at trial justifying an inference that these rip-offs of money and drugs were part of a single agreement to deal in narcotics.[56]

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56. The illogic of prosecuting this case as a single conspiracy is clearly demonstrated by the fact that the very persons whom Rossi and Coraluzzo stole money and drugs from are placed within the conspiracy by the government. (Flynn and Iacono are indicted co-conspirators; Frank Lucas and Peter Meng.one, Frank Matthews and Greg Samuels are unindicted co-conspirators.)

The remaining transactions also have an independent characteristic to them. The sale of cocaine to Thompson, Capotorto, Bertolotti and Camperlingo, and the buy of marijuana from them, were not part of an on-going single conspiracy to possess and distribute narcotics. The bulk of the negotiations with Bertolotti, et al, were for marijuana and, therefore, not in furtherance of the conspiracy. Indeed, the discrepancies in testimony raise questions as to the actuality of a cocaine transaction at all.[57]

Similarly, the Pearson-Guerra deals do not relate to the Rossi-Coraluzzo operation at all. No evidence was presented linking the purported buys and sales of coke, heroin and marijuana to Rossi or Coraluzzo. (See further discussion *infra* pp. 47-50.)

Thus, the evidence as to the totality of the transaction and Louis Guerra's role therein exposes the government's single conspiracy theory as an illogical sham. What we have in this case is a hodge-podge of thefts and drug deals which, by the nature of the acts and the participants, fail to give rise to a lawful inference of a single agreement to possess and distribute narcotics.

It is, however, well established that a showing of variance between the single conspiracy charged in the indictment and the multiple conspiracy proved at trial will not result in a reversal of conviction absent a showing of prejudice to the defendant. *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. Agueci, supra*, 310 F.2d at 827; *United States v. Miley, supra.*

The prejudice suffered by Louis Guerra in being tried for participation in multiple transactions as a single conspiracy is

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57. The sale of cocaine to Thompson and Camperlingo, supplied to Ross by Guerra (173-5) is *uncorroborated* by other witness' testimony, police surveillance, etc. Furthermore, disturbing disparities appear in the testimony and the Festa tape concerning the relationship between the cocaine and marijuana transactions. For instance, the 500-600 pounds of marijuana was said to be payment for the second kilo of cocaine (325); yet, later Rossi testified that Camperlingo came to New York City to collect money which was owed on the marijuana and complained that he was "beat." (338) Moreover, the taped conversation between Festa and Camperlingo makes no mention of a cocaine deal between Camperlingo, et al, and Rossi, but rather states that Rossi bought grass from them which never was paid for. (A 320, 1539-40)

that of fundamental denial of a fair trial.

In addition to the tactics already discussed *supra* in Part I, which constituted attempts by the prosecution to deprive Guerra of Sixth Amendment rights to cross-examination and confrontation, the conspiracy prosecution served to bury Guerra under evidence which would have been inadmissible if he had been tried separately for each of the alleged transactions.

As will be discussed at length in Points III and V the single conspiracy theory was the rationale for devastating evidence to be introduced against him. Guerra suffered from the evil condemned many years ago in Mr. Justice Jackson's concurring opinion in *Krulewitch v. United States, supra:*

> Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. . . . In other words, a *conspiracy is often proved by evidence that is admissible only upon assumption that conspiracy existed.* (emphasis added) 336 U.S. at 453

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING THE MENGRONE TAPES INTO EVIDENCE

It would be a gross understatement to say that the playing of over fifty taped conversations between Peter Mengrone and Louis Guerra, in which dealers' language and jargon, discussions of guns, kidnapping, assaults, obscenities, and racial and ethnic slurs ran rampant, created an atmosphere around defendant Guerra that made certain his conviction.

Of all the defendants on trial, Louis Guerra alone was the subject of two days of taped conversation in which not one narcotics transaction took place, but nevertheless was meant to place Guerra at the center of a narcotics conspiracy.

The effect of these tapes as indicated, *supra*, pp.20-21

was such as to create amongst the other defendants the necessity of distinguishing, and even "cleansing" themselves from Guerra. In the presence of the jury, defense counsel, one by one, moved for severance on the grounds of prejudice on two separate occasions after the playing of the tapes.[58] Several defense counsel scathingly dissociated themselves from Guerra during summation.[59]

It was clear to defense counsel that the effect of these tapes would be highly prejudicial to defendant Guerra. Repeatedly, motions to exclude the tape conversations were made to the Court on the grounds of prejudice and irrelevancy.

It was and is the defense contention that the wire-tapped conversations were being offered for the truth of the statements made therein, but in reality were part of a "rip-off" in which the defendant Guerra and others pretended to be drug dealers to induce Peter Mengrone and Frank Lucas to give money for which they would receive nothing.

The Government was very firm during argument on the admissibility of the tapes, that the tapes were being introduced in furtherance of the conspiracy itself:

> "The tapes are being introduced not to prove any other crime, not to prove armed robberies, rip-offs, or anything, they are introduced as probative of the conspiracy, the narcotics conspiracy . . . "
> (1248-49)

The Government's position made the question of whether the Court could find as a matter of law that the Lucas-Mengrone deal was a "rip-off" from inception, of critical importance. What weighed in the balance was a determination of whether Guerra's statements in the tapes could be taken as truthful attempts to consolidate a drug deal, or as false statements made as a middle-man in a "rip-off" of money.

An initial determination by the Court that this was a "rip-off" of money from the beginning would have placed the

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58. See the motions of counsel and statements of the court (1338, 1382)

59. See the summations for Eugene Bivens and Stephen Crea as examples.

wiretaps outside the scope of the conspiracy.[60]

A comparison between the evidence presented at trial and the statements in the transcript of the taped conversations, along with an examination of the posture of the prosecution, mandated a determination that the tapes were not what they were presented to be.

Only a casual examination and comparison of Rossi's testimony and the taped conversations is necessary to have the contradictions between them leap from the pages. The disparity, makes clear that the conversations could not be taken at face value.

Almost every theory and proposition of the taped conversations is shown to be false when compared to Rossi's testimony.

(1) The Deal with Mengrone and Lucas was "Honorable from the Beginning:"

Prior to Rossi's taking of $30,000 from Mengrone, his partner, Coraluzzo, had ripped-off Mengrone of some $6,000. (683) This in and of itself raises a question of the legitimacy of the deal at its inception. Furthermore, the "honorable from the beginning" statement is contradicted by Coraluzzo's statement to Pearson that "this was a rip from the beginning". (1071) In addition, there is a contradiction in Rossi's statement at trial that the deal became a "rip" when he saw Mengrone could not produce the money, (341) with his statement in the tapes that it was a rip in the beginning *until* he saw a deal could go through. (SA 193-6)

In addition, the source of the supply is the elusive "Dom Boy." (677)

Moreover, Rossi admits at trial that he was lying in the tapes (SA 27-29; 48-9), when he told Mengrone that he had the

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60. This was not the *Bynum, supra,* situation. No links between a rip-off of money and maintenance of narcotics dealings were proven, or even alleged, by the prosecution. In fact, the Government precluded this argument by maintaining an alternative position, not that a rip-off was in furtherance of the conspiracy; but that the rip-off nonetheless demonstrated the defendant's character. (2663)

narcotics ready for the deal.[61] (1344-5)

(2) Coraluzzo and Rossi were Feuding:

Guerra and Guida tell Mengrone that Coraluzzo and Rossi were feuding, so that neither Coraluzzo nor Rossi could be forced to give up the sums of money they stole from Mengrone and Lucas. (SA 106-110) While this intended "Feud" is going on, Rossi and Coraluzzo met and planned the Flynn rip-off. (648-50)

(3) Louis Lepore and Robert Browning's Role:

The wiretap transcripts indicate that Browning and Lepore know nothing about the situation concerning the deal several days after Rossi has already ripped the money off. (SA 64, 66-74) As is clear from Rossi's testimony, Browning and Rossi had prepared a pancake mix substitute for the heroin (694), and Lepore had been instructed by Rossi to call Mengrone in order to stall him. (692-3)

(4) Money Rossi Owes Guerra:

None of the statements of debt which Guerra makes on the tapes were testified to by Rossi. Clearly the prosecutor knew the tapes were untrue and therefore didn't ask Rossi to corroborate them.

(5) Mengrone's Son Kidnapping:

The story of Mengrone's son's kidnapping apparently was used by Mengrone to get money back from Rossi and Coraluzzo through Guerra. It was admittedly a ruse. (Gov. Ex. 21) (SA27)

(6) Rossi's Debts to Coraluzzo:

In order to avoid repayment of the $30,000 back to Mengrone, Rossi pretends that Coraluzzo owes him $67,000. Yet Rossi did not testify or indicate anything in his direct examination which would lead to the conclusion that Coraluzzo owed him $67,000. Moreover, when asked on cross-

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61. It should be noted that Rossi's pattern of operation here was identical to that used in the prior thefts of money from Samuels and Matthews. He used the pretense of a supply of drugs to steal money.

examination about the debt, Rossi replied that he "didn't remember." (701-2)

Thus, the bald discrepancies between the testimony at trial and the content of the wiretapped conversation required a finding that the tapes could not be taken at face value and therefore should have been excluded as not in furtherance of the conspiracy.

Yet the Court rejected out of hand, as having "no substance," the defendant's argument that the tapes were not in furtherance of the conspiracy. (1238)

Thus, the tapes were admitted on the theory that they were probative of the conspiracy itself. No limiting instructions were given to the jury concerning the tapes, and the judge's charge deals only with the issue of whether the conversations were in furtherance of the conspiracy:

> "If you conclude as to the defendants that the wiretap conversations you heard related to something else, that it had nothing to do with narcotics, as the defendant contends, then obviously these conversations cannot be considered by you as being in furtherance of the conspiracy alleged here."[62] (2752)

Therefore, the sole issue here is whether the Court's admission of the taped conversations on the theory that they were in furtherance of the conspiracy was a prejudicial error.

There can be little doubt that the combined force of the obscenities, racial and ethnic slurs, violent posturing, and supposed drug dealing was sufficient to arouse the "irrational passions of the jury"[63] (*United States v. Kaufman*, 453 F.2d 306, 311 (2d Cir. 1971)), and created in the jury "overwhelming hostility," C. McCormick, *Evidence*, §190 at 453 (2d E. Cleary 1972).

It is a long-established rule in this circuit, that where the likelihood of prejudice outweighs its probative value, the evidence should not be admitted. *United States v. Kaufman*,

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62. See discussion of th charge *infra* pp.53-54.

63. Note the reaction of the jury, *supra* p.21.

supra; United States v. Puco, 453 F.2d 539 (2d Cir. 1971); *United States v. Palumbo,* 401 F.2d 270 (2d Cir. 1968; *U.S. v. Bozza* 365 F.2d 206, 213 (2nd Cir. 1966); *United States v. Deaton, supra.*

In addition to prejudicing the defendant because of its inflammatory nature, the tapes were prejudicial because of the manner in which the government used them. The tapes were expressly introduced into evidence as conversations in furtherance of a drug conspiracy, and not as probative of the defendant's intent, knowledge, or character. Yet, the clear purpose of the prosecution's use of the tapes was to demonstrate the defendant Guerra's familiarity with the language of the drug trade, and to prop up otherwise uncorroborated and questionable assertions of prosecution witnesses.[64] Their "probative value" was to build an iron-clad case against the defendant by innuendo and falsehood.

Thus, the prosecutor had no qualms about stating to the jury during summation that the tapes indicated Guerra's general familiarity with narcotics dealing and therefore his participation in the charged drug conspiracy.

The government told the jury that it did not matter whether the taped conversations represented a hoax, stating,

> "It is obvious, whether it was a rip-off in the beginning, it was a rip-off in the end, that Mr. Guerra was talking narcotics with Mr. Mengrone, and that Mr. Guerra knew what was going on." (2663)

A representation like the above to the jury was not only irresponsible, but indicative of the type of damage those tapes were calculated to create.

The admission of these tapes into evidence clearly was prejudicial error requiring a reversal of conviction.

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64. It is important to note that the prosecutor spent almost 20 pages in his summation on the wiretaps (2646-65).

POINT IV

THE PROSECUTOR'S MISCONDUCT IN PUTTING FORWARD THE MENGRONE TAPES FOR THE TRUTH OF STATEMENTS THEREIN REQUIRES REVERSAL OF CONVICTION

The presentation of the Mengrone wiretapped conversations for the truth of the statements therein was an act of misconduct by the prosecutor. There is every reason to believe that the prosecutor knew or should have known that the phone conversations between Guerra and Mengrone were not in furtherance of the alleged drug conspiracy but rather a grand larceny.

The prosecutor had before him all the facts which were before the court in deciding whether the taped conversations were in furtherance of a rip-off or a drug conspiracy.

In the course of his preparation and investigation for trial, the prosecutor must have debriefed Rossi so that he knew at the outset of trial that:

(1) Browning and Lepore played a false role in the conversations with Mengrone;

(2) Guerra had not paid for plane tickets for Rossi and crew, nor did Rossi owe Guerra $30,000;

(3) The source of drugs for the Mengrone-Lucas deal—"Dom Boy"—was a hoax, and that Rossi did not have the drugs on the date of the deal;

(4) That Coraluzzo did not owe Rossi $67,000;

(5) That Mengrone's son was never kidnapped.

(6) That Coraluzzo and Rossi were not fueding but planning the Flynn "rip-off."

It is substantiation for the defense' contention that the prosecutor knew the falsity of innumerable critical portions of the testimony by the fact that the government did not ask Rossi one question during direct examination about the wiretapped

conversations.[65] Rossi is never asked to explain the problems he was supposedly having as related by Guerra in the tapes, or what role Guerra was playing and why.

In addition, the prosecutor knew that Peter Mengrone's son was not kidnapped as stated in the wiretaps. This is a fact which *the government never disclosed* to the jury. Despite the constant physical and electronic surveillance of Peter Mengrone, by means of aviation units with helicopter, surveillance trucks, and tailing cars (1981-2), no one is called by the prosecution to corroborate events alleged to have happened in the conversations. Indeed, it was the defense that introduced the testimony of Lt. Joseph Greeley, who stated that he knew (as one of those in charge of the wiretap conversation) that there was no kidnapping of Mengrone's children (1993).

These facts give prima facie evidence that the prosecutor in bad faith misrepresented the content of these conversations by putting them forward for the truth of the statements therein.

Even if the prosecutor did not initially know of the rip-off quality of the transaction and therefore the sham content of those conversations, he should have undertaken the responsibility to investigate their truthful nature when defense counsel told him both before and during the trial that they were a "scam."[66]

The responsibilities of the prosecutor as a public official have long been established.

> "The United States Attorney is the representative . . . of a sovereignty whose obligation to govern impartially is as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."
> *Berger v. United States*, 295 U.S. 78, 88 (1935).

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65. An interesting comparison can be made between the Government's handling of the tapes vis-a-vis witnesses' explanation here and in the situation of the Festa type. In the Festa situation, the Government had Festa testify in minute detail the entirety of the conversation between himself and Camperlingo and then played the tape for the jury.

66. Counsel for Guerra informed the prosecutor weeks before the trial that the wiretaps were a pretense for a theft of money. See Guerra's motion for a new trial and a hearing. (A296)

Where the prosecutor does not fulfill his affirmative duty to insure that false testimony is not presented in court, the defendant is denied his rights to due process of the law. *Napue v. People of the State of Illinois*, 360 U.S. 264 (1959); *Mooney v. Holahan*, 294 U.S. 103 (1935).

Indeed, the cases are now legion that require reversal of conviction where the prosecutor's conduct has transgressed the basic principles of fair play as embodied in the due process clause. *Brady v. United States, supra; Napue v. Illinois, supra.* See also, *United States v. Pfingst*, 490 F.2d 262 (2d Cir.), *cert. denied*, 417 U.S. 919 (1974); *Kyle v. United States*, 297 F.2d 507 (2d Cir., 1961).

The Supreme Court in *Napue, supra*, quoted with approval from *People v. Savvides*, 1 N.Y. 2d 554 (1956). Judge Fuld's statements there should be despositive of this issue.

> "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach . . . A lie is a lie, no matter what it's subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what knows to be false and elicit the truth . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."
> *1 N.Y.2d, at 556-7.*

This Court should therefore reverse the conviction of the defendant on the grounds that prosecutorial conduct in misrepresenting the content of the taped conversations deprived the defendant of a fair trial.

In the alternative, should this Court not be fully convinced of the knowing misconduct by the prosecutor, the case should be remanded for an evidentiary hearing to determine if the prosecutor knew or should have known that the conversations were in furtherance of a rip-off as requested by defense counsel in his Motion for an Evidentiary Hearing (A296).

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING TESTIMONY ON THE PEARSON-GUERRA TRANSACTIONS AND MARIJUANA TRANSACTIONS

The Court erroneously admitted testimony by Gary Pearson about six drug transactions or attempted transactions between Louis Guerra and Pearson on the theory that they were acts in furtherance of the conspiracy.

The Government's position was that the purpose of introduction went to proof of the conspiracy, as a transaction in furtherance of the conspiracy charged in the indictment. (972)

Initially, the Court did not accept the Government's theory that the transactions were *among* the co-conspirators and that the relationship between Pearson, Rossi and Guerra were such as to justify a finding that Guerra-Pearson deals were part of the conspiracy. (975)

The Court thereby excluded the testimony subject to some further agreement that would establish that the Pearson-Guerra deals were not independent transactions. (977)

At that point, the Government proposed introduction of the deals on the grounds that they were admissible as probative of Guerra's state of mind, i.e. that he was dealing in narcotics. (977) The Court, over defendant's objection, ruled that introduction on that ground would not be prejudicial, either to defendant Guerra (979) or to the other defendants.[67] (980)

However, prior to continuing Pearson's testimony, the Court, at defense counsel's suggestion, held a hearing outside the presence of the jury, on the Pearson-Guerra deals. During the course of that hearing, Pearson stated that Rossi and Coraluzzo did not participate in the heroin transactions (993); that DiSalvo's source for the heroin ultimately sold to Guerra

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67. This theory of admission was abandoned by the government and the court subsequent to the determination of Guerra, Rossi, Coraluzzo partnership discussed herein.

was not one of the people charged in this indictment (994); and that Guerra's buyer for the heroin was not anyone charged in this indictment (995).

In regard to the cocaine transaction, Pearson testified that Guerra was partners with Coraluzzo and Rossi in bringing cocaine from California. (996-998)

> Pearson: He [Guerra] told me on various occasions that he had a connection in California, that they [Rossi and Coraluzzo] were pulling a good quantity of cocaine from California from a direct source.
>
> Q. Did he tell you that Mr. Coraluzzo or Mr. Rossi were involved in this California connection?
>
> Pearson: Yes, he had told me that they were partners and at the time that he had financed a lot of new operations and that Ernie and Albert had owed him around, approximately $30,000 (998)

On the basis of this testimony, placing Guerra as a partner of Rossi and Coraluzzo and selling narcotics, the Court admitted testimony as to both the heroin and cocaine[68] transactions. (999)

Yet, before the jury, Pearson's testimony failed to establish the very facts which provided the basis of admitting his testimony:

> Q. Did he [Louis Guerra] indicate to you whether or not he was in partnership with these two individuals [Rossi & Coraluzzo]?
>
> A: Well, I believe so, because it was just shortly thereafter that I had consigned from Louis 10 pounds of marijuana and the deal for the marijuana the three of them were together on. (1010-11)

Defense counsel's motion to strike on the grounds that Pearson was testifying as to belief rather than actual knowledge (1011) prompted the Court to direct the government to clarify the situation. (*Ibid*)

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68. There was no discussion at this time on the admissibility of marijuana transactions between Pearson and Guerra.

Pearson: I don't believe on the California cocaine that Louis had told me that he was in a definite partnership with them . . .

Govt.: To your recollection, just tell us what he did say about that particular cocaine from California.

Pearson: Well, he did say that it was his connection and that it was his people in California, I guess, it was assumptions on my part that the three of them were together.
(1011-12)

At this point, the Court granted the defendant's motion to strike. (1012)

Subsequently, defense counsel moved for a mistrial, or in the alternative for limiting instructions on the admissibility of the testimony. (1031) The Court denied the motion at that time and again after another application by the defendant (1082) on the grounds that Pearson testified that Guerra, Rossi and Coraluzzo were partners generally as well as particularly in the California transaction. (1082-4) Therefore, the Court did not view the struck testimony on the California partnership as determinative of a sustaining partnership between Guerra, Rossi and Coraluzzo which it believed Pearson had earlier testified to.

The Court's position was that the record supported a finding that the testimony was admissible on the conspiracy theory. (1085)

The court maintained that Pearson established that the partnership existed as to the marijuana transactions and that this was sufficient to establish the partnership severally. (1147) Thus, despite the fact that Rossi had testified to neither a partnership with Guerra or a debt to Guerra, the court found support for the partnership theory sufficient to allow the testimony regarding the Pearson-Guerra deals to be admitted as acts in furtherance of the conspiracy.[69] (1478)

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69. Even if the court were to accept the validity of the determination of a partnership in marijuana transactions as demonstrative of a general partnership, the change in the government's theory regarding the marijuana should have deterred this finding. A conspiracy to deal in marijuana is not in furtherance of a conspiracy to possess and distribute cocaine and heroin.

Such a position was clearly erroneous. Pearson had testified to a partnership between the three as to the cocaine from California (992) and that was the very substance of his change in testimony before the jury. (1010-11)[70]

Thus the record demonstrated that there was no basis for the admission of Pearson's testimony on transactions with Guerra as being in furtherance of the conspiracy.[71]

In fact, the testimony of Pearson was more supportive of the multiple conspiracy theory put forth by the defendant repeatedly throughout the trial.

Moreover, the partnership theory as testified to by Pearson was inherently suspicious and illogical when compared to the government's own theory of the case, Pearson's prior testimony and reports to the government and Rossi's testimony. For example, the government posited the Guerra-Rossi-Coraluzzo partnership theory immediately after explaining to the court that Guerra, although a supplier to the conspiracy, was not even in the "core" grouping! And Pearson, interestingly enough, neither before the grand jury nor with Drug Enforcement Agents ever reported the "partnership". (1063-4) Moreover, Rossi never gave any testimony to indicate Pearson as being in the "core" of any conspiracy but the Flynn rip-off. (663-5)

It is therefore clear as a matter of law that Pearson's testimony was questionable at best and necessitated exclusion or instruction or limiting purpose.

The erroneous admission of testimony about these transactions was prejudicial error. In fact, the Pearson deals played largely in the court's marshalling of the evidence against Guerra. In summarizing the government's case against Guerra, approximately *half of the court's comments were directed towards the Pearson-Guerra transactions.* [*2767-8*]

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70. Of question is the 10 lbs. of marijuana which Pearson testified the "three of them were together on." (1011) Neither the Government nor defense questioned Pearson further on the partnership as it related to the marijuana.

71. As will be discussed, the testimony could not be admissible under another theory, i.e. state of mind, since the requisite theory was not put forward by government nor were limiting instructions given by the judge. (*infra*, p. 52)

Admission of Marijuana Transactions

Throughout the course of the trial, testimony about marijuana transactions was admitted, over vigorous objections by defense counsel (322), as acts in furtherance of the conspiracy.

The more substantial instances were:

(1) Transaction between Thompson, Bertolotti, Camperlingo, Capotorto, Rossi, and Coraluzzo, for 500-600 pounds of marijuana;

(2) In minute detail, arrangements in getting marijuana to New York City area, including arranging to meet Guerra and taking marijuana to the house that Guerra rented;

(3) Sales of this marijuana to co-defendants, including 100 pounds to Guerra;

(4) Cafe Ferrara meeting, including Guerra, to discuss payment for the marijuana;

(5) Guerra's sale of 10 pounds of marijuana to Pearson.

It was not until the pre-charge conference that the Government changed its theory of the case and decided that the conspiracy did not involve the selling and distributing of marijuana (2226-8). Despite the fact that the testimony about marijuana transactions was introduced without any limiting instructions, the court denied a motion for mistrial (2231).

Incredibly enough, the court held that the marijuana transactions were not prejudicial to the defendants:

"Court: I don't regard any marijuana transaction as being prejudicial.

Katz: They were talking about 2 tons of marijuana.

Court: I don't regard any tons of marijuana as being prejudicial in terms of the present climate of opinion in the country. I don't regard that as being prejudicial." (2230-1)

In an attempt to correct the situation by which the jury had already viewed the marijuana transactions as applicable to all

the co-defendants believed to be co-conspirators, the judge gave a charge that was confusing. While cautioning the jury that if they find a defendant conspired only to distribute marijuana, they cannot be found guilty, the court's charge was unclear on the import of the marijuana testimony and to whom it was admissible against:

> "I permitted testimony that some defendants . . . engaged in transactions involving the purchase and sale of marijuana. This testimony was admitted as part of the government's evidence concerning the conspiracy charged in the indictment. If you believe the testimony about the marijuana transaction you may consider it in deciding whether the conspiracy charged in the indictment existed . . . " (2747-8)

This last minute attempt to rectify the prosecutor's confused handling of the case were futile. The charge was unclear in that it made no distinctions between the marijuana transactions as probative of character, intent, similar acts, etc., despite the instruction to find a defendant not guilty where the jury determined a defendant dealt exclusively in marijuana.

The function of the marijuana evidence was to bolster a shakey case and insure conviction.

The theory on which both the Pearson-Guerra deals and the marijuana testimony were introduced was that they were in furtherance of the conspiracy charged. Limiting instructions on another theory were not given to the jury at the time they were played nor during the court's charge.

Without such instruction, the conversations cannot now be found to be admissible under another theory of evidence. *United States v. Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States v. Klein*, 340 F.2d 547, 548-9 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965); *United States v. Stanton*, 336 F.2d 326, 328 (2d Cir. 1964).

In an abundance of caution, the defense also contends that should it be determined that the conversations could legitimately be admitted as probative of defendant's state of mind and character without limiting instructions, that the conversations are too prejudicial to justify their admission.

POINT VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS CHARGE TO THE JURY

The trial court committed reversible error in its marshalling of the evidence against Louis Guerra and in its instructions on the Mengrone-Guerra taped conversations. Both irreparably prejudiced defendant Guerra in that they reduced the defense's arguments to an absurdity.

In marshalling the evidence the court stated:

> "Louis Guerra contends that *all of Rossi's testimony about drug dealing is false,* that Rossi's forte was robbing and stealing; that the wiretapped conversations which you heard do not involve any drugs but involve a robbery of Lucas, Matthews, and Peter Mengrone; that he never dealt with cocaine, heroin or marijuana with Rossi or anyone else; that *all of Rossi's testimony is pure fabrication;* that he never had any transactions with Gary Pearson; that he never delivered any cocaine to Lombardo and that his testimony concerning his bringing cocaine for sale to Capotorto and Thompson has been proved false by evidence of Capotorto's illness and hospitalization." (2777) (emphasis added)

This summary of the evidence was a clear distortion of the defense. It was never alleged that Rossi had *no dealings* in narcotics, nor that Rossi *never* told the truth. To posit the defense's case in such a manner was an abuse of the judicial power to marshall the evidence, making it nearly impossible for the jury to deal seriously with the defense's contention.

In a similar fashion, the court's charge om the wiretap was prejudicial because of its distortion.

> "Let me add something which is obvious. If you conclude as to the defendants that the wiretap conversations you heard related to something else, that *it had nothing to do with narcotics, as the defendants contend,* then obviously these conversations cannot be considered by you as being in furtherance of the conspiracy alleged here." (emphasis added) (2752)

The defense position was not that the conversations "had nothing to do with narcotics," but rather "reflect an attempt to steal Mr. Mengrone's money through fraud . . . with no intent to supply any narcotic drugs."[72]

The statement that the wiretaps are in furtherance of the drug conspiracy when they had *nothing* to do with narcotics effectively negated any possibility that the jury would accept the defense theory.

In so marshalling the evidence and charging the jury, the defendant's case was irreparably prejudiced.

Thus, the court's lack of requisite care in marshalling the evidence and charging the jury on these sensitive and critical points resulted in irreparable prejudice requiring a reversal of conviction and a new trial. *Quercia v. United States*, 289 U.S. 466 (1933).

POINT VII

APPELLANT GUERRA JOINS IN EACH OF THE POINTS OF LAW RAISED BY THE OTHER APPELLANTS, WHERE APPLICABLE TO HIM AND NOT INCONSISTENT WITH ANY CONTENTIONS ASSERTED HERE

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72. Defendant Guerra's request to charge VI wiretap conversation (SA 273).

CONCLUSION

For all of the foregoing reasons, the appellant Guerra's judgment of conviction should be reversed and the indictment dismissed, or, in the alternative, a new trial should be granted.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7 day of June, 1975 at No. 111 Centre Street, N.Y.C. deponent served the within Brief upon N.Y.S. Attorney General the appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 7 day of June 1975

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973